

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA,)	
EX REL. HICHEM CHIHI, <i>et al.</i> ,)	
)	
<i>Plaintiff-Relator,</i>)	Judge Charles R. Eskridge III
)	
v.)	Magistrate Judge Sam S. Sheldon
)	
CATHOLIC HEALTH)	
INITIATIVES, <i>et al.</i> ,)	
)	Civil Case No. 4:18-cv-00123
<i>Defendants.</i>)	

[Proposed] Exhibit A to Plaintiff's Brief in Support of Objection
(Dkt. 334, at pages 14-15)

Transcript of January 27, 2022 Hearing
(see Trans. 3:12-3:20 and 28:4-28:5)

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE SOUTHERN DISTRICT OF TEXAS

3 HOUSTON DIVISION

4 CHIHI, ET AL. § CASE NO. 4:18-cv-00123
§ HOUSTON, TX
5 VERSUS § THURSDAY,
§ JANUARY 27, 2022
6 CATHOLIC HEALTH INITIATIVES, § 12:05 P.M. TO 1:24 P.M.
ET AL. §

7 STATUS CONFERENCE

8 BEFORE THE HONORABLE CHARLES ESKRIDGE
9 UNITED STATES DISTRICT JUDGE

10 APPEARANCES:

11 FOR THE PARTIES: SEE NEXT PAGE
12 COURT REPORTER: RACHEL WILLBORG
13 COURT CLERK: SHANNON JONES
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1 HOUSTON, TEXAS; THURSDAY, JANUARY 27, 2022; 12:05 P.M.

2 THE COURT: Chihi versus Catholic Health Initiatives,
3 et al. It's 18-cv-123. Ms. Brown's here on behalf of the
4 Plaintiffs and the relator. Mr. Coffey and Mr. Funk are here
5 on behalf of the hospital defendants. Mr. Robinson, you're
6 here on behalf of Baylor College of Medicine, right?

7 MR. ROBINSON: Correct, as well as Doctors Sista and
8 Katz.

9 THE COURT: Okay. And Mr. Houston is here on behalf
10 of Mr. Hoffman. Last week, I gave the parties a tentative
11 ruling. We didn't put it on the record.

12 My tentative ruling would be too to dismiss with
13 prejudice the hospital defendant, CHI, but not dismiss
14 defendant, CHI St. Luke's, but to allow the Relator to name,
15 only amend to name Baylor Saint Luke's Medical Center.

16 The tentative was to dismiss the 32 provider
17 defendants without prejudice except keep in the case Dr. Alan
18 Hoffman. It was also to dismiss the false claims, the reverse
19 false claims count, Count 3, the conspiracy, Count 4, and the
20 Stark violation as to CHI and CHI St. Luke's Health.

21 I gave the parties one week to think about this and
22 see if they could come to an agreement regarding my tentative.
23 They couldn't come to an agreement, so we will issue a formal
24 memorandum and recommendations probably along those lines.

25 So let me start with the hospital defendants. Mr.

1 Coffey, you wanted to be heard.

2 MR. COFFEY: Thank you, Judge. As I mentioned
3 previously, there are certain rulings that we are inclined to
4 accept and some tentative rulings that we'd like to object to.
5 So I thought it might make sense to run through our
6 understanding of the tentative rulings and our position and
7 then follow up with our rationale.

8 THE COURT: Sure. Okay.

9 MR. COFFEY: Thank you, Judge. So the hospital
10 defendants are willing to accept the recommendation to dismiss
11 all counts, 1 through 9 against Catholic Health Initiatives
12 with prejudice. We also accept --

13 THE COURT: Let me stop you one second, Mr. Coffey.
14 I forgot to mention, I didn't say that I would keep -- right,
15 as to the defendants that are staying in, I would keep the
16 Texas claims alive, but go on.

17 MR. COFFEY: Okay. Thanks, Judge. In addition, we
18 would be accepting the recommendation to dismiss the Stark
19 based claims against all the hospital defendants to the extent
20 that dismissal would also be with prejudice. And we would
21 accept the recommendations to dismiss Relator's false claims
22 count, which is Count 3; the conspiracy count, Count 4, against
23 the hospital defendants to the extent those will also be
24 dismissed with prejudice.

25 The hospital defendants would be inclined to object

1 to the Court's recommendation to deny the PMFPA claims which
2 are laid out in Counts 5 through 9. We'd also object to the
3 Court's recommendation to deny the hospital defendant's motion
4 to dismiss as to the AKS based false claims. And we'd also
5 object to the Court's recommendation to allow Relator to add
6 nonparty Baylor Saint Luke's Medical Center which is not
7 represented at this hearing today, to add that defendant, to
8 add Baylor Saint Luke's Medical Center as defendant as this
9 late stage. So we'd object to that as well, Your Honor.

10 THE COURT: Anything else, Mr. Coffey, Judge?

11 MR. COFFEY: Judge, we can go through with our
12 rationale now or we can hear from the other defendants as to
13 what they're willing to accept.

14 THE COURT: No, I would go -- let me hear your
15 rationale.

16 MR. COFFEY: Okay. Judge, starting with the Court
17 recommendation to allow Relator to add Baylor Saint Luke's
18 Medical Center at this late stage, a few reasons we are
19 inclined to object to that, we don't think it's proper. As we
20 mentioned, Baylor Saint Luke's Medical Center is a nonparty and
21 is not represented by counsel. However, will be making these
22 arguments, you know, from our perspective. It's a separate
23 legal entity with its own Board. It's got 12 members. They're
24 separate owners, separately licensed. It's got its own MPI.
25 And so this is not as simple as, you know, swapping in Baylor

1 Saint Luke's Medical Center or just adding it. There's no
2 overlap with the Board of Directors between Baylor Saint Luke's
3 Medical Center or any of the hospital defendants. And as we
4 mentioned in our last hearing, Judge Eskridge already informed
5 Relator that he was not to amend his complaint.

6 And we'd like to quickly run through the history and
7 make it clear for the record that Relator was, in fact, put on
8 notice of the hospital defendants' arguments as to Baylor Saint
9 Luke's Medical Center. And Relator made a very intentional and
10 informed decision not to include Baylor Saint Luke's Medical
11 Center. This was his choice and he should be required to stick
12 with it at this point.

13 And one thing I wanted to make clear, Judge, at the
14 last hearing, Ms. Brown had indicated in response to your
15 question as to why the Relator had not added Baylor Saint
16 Luke's Medical Center that perhaps there was somebody else
17 within her law firm or another law firm that drafted the
18 initial complaint. To be clear, it's not a law firm's
19 complaint, of course, it's the Relator's complaint. But also
20 Ms. Brown has been in contact with counsel for the hospital
21 defendants since as early as November 2018. So that was after
22 the initial complaint was filed under seal but before any
23 amendments were filed. She had indicated, Ms. Brown that is,
24 in December 2018 that Relator planned to file a first amended
25 complaint. And so regardless, as I said, who drafted the

1 complaint, it is Relator's complaint and both counsel and
2 Relator, himself, were on notice of these issues.

3 On April 4, 2019, the hospital defendants filed their
4 first motion to dismiss the first amended complaint. In it, we
5 explicitly informed Relator CHI and CHI Saint Luke's were not
6 properly named as defendants based on the facts that were
7 alleged in the first amended complaint. And that's Docket 169
8 at Page 6. I'm not going to read all of our arguments into the
9 record, but there's a few notable passages I think bear
10 mentioning.

11 We argued in relevant part that the majority of
12 Relator's allegations put SLMC and not CHI Saint Luke's or CHI
13 at the center of the purported kickback scheme. We said once
14 it was clear that the underlying conduct was allegedly carried
15 out by individuals within Baylor Saint Luke's Medical Center
16 and designed to induce referrals to the hospital -- and this is
17 a quote -- "It is unclear why CHI or CHI Saint Luke are named
18 as defendants in this case."

19 We also pointed out that Relator did not identify any
20 individuals who work for those distinct legal entities or
21 alleged how they participated in the alleged kickback scheme.

22 So Relator was clearly on notice of these arguments
23 as early as April of 2019, about three years ago.

24 Before responding to the first motion to dismiss,
25 Relator sought leave to file a second amended complaint in the

1 middle of the briefing process. Even in the faith of the
2 argument that I just raised, Judge, the proposed second amended
3 complaint did not include Baylor Saint Luke's Medical Center.
4 That was, again, an intentional decision on the part of
5 Relator. When Relator did respond to CHI, CHI's first motion
6 to dismiss, and this was on May 31st, 2019, he again stated in
7 very clear terms that he did not intend to add Baylor Saint
8 Luke's Medical Center as the defendant.

9 So there he said that he had provided specifics as to
10 who engaged in the fraud. He said the fraud was spearheaded by
11 just two hospital descendants and he clearly wrote Catholic
12 Health Initiatives and CHI Saint Luke's who jointly operated
13 and managed the International Services Department. He also
14 noted that the hospital defendants acted through their agent
15 employees, Miss Matar and Miss Sanchez.

16 In other words, Judge, Relator clearly articulated
17 his position that it was CHI or CHI Saint Luke's employees that
18 carried out the acts that are at issue in the first and second
19 amended complaints. And there are no employees at Baylor Saint
20 Luke's Medical Center at issue in the complaint.

21 Again, the passages I just read are located at Docket
22 Entry 205, Page 45.

23 Later in his motion for leave to file a second
24 amended complaint, Relator stuck to his decision not to include
25 Baylor Saint Luke. According to the Relator, the proposed

1 second amended complaint that was attached to that motion for
2 leave added detail regarding the hospital defendants'
3 relationships to the ISD. And again, that's Docket 191 at Page
4 4.

5 So you know, in defendants' motion to dismiss the
6 second amended complaint, we once again argued this pleading
7 lack sufficient allegations against the hospital defendants and
8 that Relator's failure to name Baylor Saint Luke's Medical
9 Center as defendant was fatal. We said in relevant part,
10 Baylor Saint Luke's Medical Center which is a distinct legal
11 entity from CHI Saint Luke's and was not named as a defendant
12 is not alleged to be a part of CHI. That's at Docket 302, Page
13 7 to 8.

14 In response to that second motion to dismiss, Relator
15 doubled down on his decision not to include Baylor Saint Luke's
16 Medical Center. He said -- and I quote -- "Whether BSLMC
17 itself presented the claims is of no moment." He goes on to
18 say that the hospital defendants' agents and employees, not
19 agents and employees of the BSLMC developed and implemented a
20 scheme to pay doctors in order to induce referrals, BSLMC. He
21 says at all relevant times, the ISD employees were all
22 employees and agents of the CHI defendants. And that's at
23 Docket Entry 309, Pages 106-107.

24 So, you know, based on Relator's own statements, it
25 was clearly his decision not to include Baylor Saint Luke's

1 Medical Center as defendants. Allowing him to do so now,
2 (indiscernible) his own intentions, but also would not be
3 proper under Rule 9(b). It wouldn't be proper under Rule
4 15(a). And it certainly would go against Judge Eskridge's
5 statement that Relator should not be allowed to amend the
6 second amended complaint any further.

7 THE COURT: Before I have some questions for you, Mr.
8 Coffey, let me hear from Ms. Brown.

9 MS. BROWN: Yes, Your Honor, a couple, a couple
10 matters. You know at the time we filed the complaint and the
11 most recent amended complaint, the corporate structure of all
12 these entities was not entirely clear to us. And we thought
13 that by naming CHI Saint Luke's we had included liability for
14 the acts of the Medical Center because of the way we understood
15 the corporate structure. And also in the way that we laid out
16 the allegations, we defined CHI to include the hospital.

17 As our understanding has evolved, we think the
18 hospital, Baylor Saint Luke's Medical Center and CHI Saint
19 Luke's need to be in the case.

20 THE COURT: Let me ask you this, let's just stay why
21 CHI Saint Luke's? Tell me, tell me the paragraphs were you
22 sufficiently link them up with the conduct, with the kickback
23 conduct.

24 MS. BROWN: Because our information and our
25 allegations -- and I'll get you the paragraphs in a second --

1 are that some of the individuals who put together the scheme
2 were employed by CHI Saint Luke. And so in that way, CHI Saint
3 Luke's was exercising control over the scheme and causing it to
4 be implemented. And its agents were, you know, caused it to be
5 implemented.

6 THE COURT: Let me just stop you. So if I understand
7 MR. Coffey's argument, is that nothing that you've actually
8 alleged in your second amended complaint supports that as far
9 as who these employees are, their position, that everybody
10 that's named or referred to is related to the Baylor Saint
11 Luke's Medical Center and not CHI Saint Luke's. So that's what
12 I'm saying. I know there's 300 paragraphs but that's what I'm
13 trying to get into. If I don't, if I change my mind and don't
14 allow you, I want to know how CHI -- my confusion with CHI
15 Saint Luke's, Mr. Coffey, and the exhibits, it just says -- it
16 doesn't say, when you're looking at some of these folks, it
17 doesn't say Baylor Saint Luke's Medical Center, it just says
18 CHI.

19 MS. BROWN: That's right, Your Honor, and I'll point
20 you to Paragraph 20 of the second amended complaint where the
21 relationship of CHI Saint Luke's to the ISD is outlined with
22 specific allegations. The employees of the ISD were receiving
23 paychecks and employment evaluations. And from -- well are
24 considered -- scratch that. I'm sorry. Those are relating to
25 CHI but let me move to CHI Saint Luke's. The Vice President

1 Tania Matar and Associate Director Sanchez and other
2 representatives and agents of the ISD used the CHI Saint Luke's
3 corporate email logo. They have email addresses that end in
4 CHI Saint Luke's Health. They're promoted as -- by CHI Saint
5 Luke's as their team. There are, there are other details in
6 here as well, but there are paychecks from CHI Saint Luke's, or
7 there's letterhead, you know, they send out information on CHI
8 Saint Luke's letterhead for the ISD. So this is a situation in
9 which, you know, our information is that some of these
10 individuals were employed by CHI Saint Luke's. And, of course,
11 it may turn out --

12 THE COURT: Let me let me stop you right there. So
13 that was my confusion, Mr. Coffey, that it's not that -- let's
14 just say I don't allow Baylor in, right? I still, from a
15 factual standpoint, for some of the things that she said -- and
16 I get your legal arguments and I think maybe you're right on
17 summary judgment -- but I just, I just couldn't tell at this
18 early stage -- I understand the legal argument that ultimately,
19 if you can prove that there are three separate entities and
20 then everything that she's saying is, and I know that, you
21 know, summary judgment, there is also factual disputes. You
22 know, I can't decide factual disputes, but here, even at an
23 earlier stage, respond to what she's saying.

24 MR. COFFEY: Sure, Judge. And I think it's important
25 to repeat that, understanding that it wasn't clear the

1 corporate structure, we made it clear in our first motion to
2 dismiss where we explained that Baylor Saint Luke's Medical
3 Center was, in fact, a separate legal entity, and that there's
4 no allegations against Baylor Saint Luke's Medical Center
5 employees. So she was put on notice. And in the face of that
6 information, she continued and -- I apologize --

7 THE COURT: So yeah, that's a good point. So why,
8 Ms. Brown -- sorry, but if I don't interrupt, then I'll forget
9 what the answer is. After they made those assertions in the
10 first amended complaint, then why are we where we are now? Why
11 didn't you change it? Unless you're going to say, hey, we
12 disagree. We think we think that what he's saying is not true.
13 That's my concern is that -- is you allege this. They're
14 saying that's not true. Where's the evidence? Because you
15 have to take the position that like -- and I don't mean that
16 you're calling him a liar, but what I'm saying is that you have
17 to take the position that what Mr. Coffey is saying factually
18 isn't true.

19 MS. BROWN: Well, we rely on the information that the
20 Relator has at this point. This is prior to discovery and the
21 information that he has, has caused our understanding to
22 evolve. You know what we see are documents on CHI Saint Luke's
23 letterhead, you know, payments, checks for payments that are
24 sent to CHI Saint Luke's Health, employees that are using CHI
25 Saint Luke's Health as their, you know, their email address.

1 And at the same time, we understand that Baylor Saint Luke's
2 Medical Center is the hospital where the scheme was, you know,
3 the ISD was operating out of there. And so we also included in
4 our complaint, we decided CHI Health to include Baylor Saint
5 Luke's Medical Center. And these are the kinds of, you know,
6 technical issues for that, you know, amendment is perfectly
7 appropriate at this stage to include, you know, a corporate
8 entity when there was some misunderstanding about the nature of
9 the corporate relationship. And entirely absent from
10 defendant's argument is any argument about prejudice, or before
11 the deadline to -- there hasn't even been a deadline to amend,
12 to add additional parties.

13 We disagree that Judge Eskridge said that we were not
14 amend, he only said that we were not to amend before a ruling.
15 And, you know, I think, you know, discovery has not yet begun.
16 You know, if you allow us to amend to add Baylor Saint Luke's
17 Medical Center, they will, of course, have an opportunity to
18 file a motion to dismiss and to raise any arguments that they
19 may want to raise.

20 THE COURT: Let me stop you. So, Mr. Coffey, so like
21 for example, when I was saying what was causing me confusion, I
22 looked at these exhibits, right? The payments that are being
23 made from the provider -- sorry, from the hospital to the
24 provider, the checks say CHI Saint Luke's. So I'm looking at
25 like Exhibit 2. And then Exhibit 3, whenever the Relator is

1 sending an email, it says, you know, International Patient
2 Representative, CHI Saint Luke's and then underneath that,
3 Baylor Saint Luke's Medical Center. And so I guess my dilemma
4 at this point is I know you're saying that that CHI Saint
5 Luke's is a completely separate legal entities than Baylor
6 Saint Luke's Medical Center, but if I'm just reading this and
7 his point is that this was a scheme that both were involved in,
8 both names are on there. That's why last week I said I was
9 inclined to leave them in because at this pleading stage, I
10 just, I don't know. I mean, I'm just indifferent because it's
11 right on the document. You know so it's not just him saying.

12 MR. COFFEY: Sure.

13 THE COURT: So let me ask you this, Ms. Brown, I mean
14 well, she's going to revert back to well, we don't know because
15 we haven't gotten discovery, but ultimately, what you're saying
16 is the evidence is going to play out that -- your position is
17 the evidence will play out that that nobody has any liability.
18 But regardless of that, CHI Saint Luke's has nothing to do with
19 the allegations that Relator is making, right? I mean that's
20 ultimately your position is CHI Saint Luke's has nothing to do
21 with this because the Relator didn't work for CHI Saint Luke's.
22 The Relator worked for Baylor Saint Luke's Medical Center and
23 that Baylor's Medical -- Baylor Saint Luke's Medical Center is
24 actually providing hospital services where CHI Saint Luke's
25 Health is just a corporate entity. I mean I got that, you

1 know, your star card. I mean that's -- am I -- I don't want to
2 misinterpret your position.

3 MS. BROWN: Was that --

4 THE COURT: No, I was asking Mr. Coffey. That's your
5 position?

6 MR. COFFEY: You know, Judge, our position is that
7 regardless of what Relator is saying today, Relator's intent
8 and her statements were very clear. In various briefings that
9 were filed with the Court, Relator stated that the employees
10 who allegedly directed the scheme were employees of CHI Saint
11 Luke's. We notified Relator that's a separate legal entity.
12 The Relator chose to not add Baylor Saint Luke's Medical
13 Center. It's not a technical issue at this point. Relator is
14 required to plead fraud with specificity and particularity at
15 the outset. Despite having multiple amendments and plenty of
16 time to add those details, Relator has not done that. Relator
17 made an intentional decision not to add Saint Luke's.

18 It's also no secret discovery is not necessary to
19 determine one, what we're already saying through our briefings,
20 and two, that, you know, Baylor Saint Luke's Medical Center is
21 quite obviously, and very clearly, a separate legal entity.
22 Those documents are in the public domain that show that.
23 There's a 990 report, it's got its own MPI. There's no
24 question about the separate legal -- the fact it's a separate
25 legal entity.

1 THE COURT: It's separate, I mean, I don't dispute
2 that. But if it's a separate legal entity, the check -- so,
3 for example, the checks that they're saying that are part of
4 the case -- you know, their theory of the kickback scheme is
5 they're collecting, they're collecting money and they're paying
6 the provider defendant. Those payments that are coming from
7 the hospital is not coming from Baylor Saint Luke's Medical
8 Center. But if we look at Exhibit 2, it's coming from Catholic
9 Health Initiative. And so that's what I'm saying. It's not
10 just what she's saying. It's just -- and then when we look at
11 like some of the cover pages within Exhibit 2, it says the
12 check is from Catholic Health Initiatives but then like the
13 payment breakdown is from the CHI Saint Luke's Health.

14 MR. COFFEY: Sure. And it's our understanding,
15 Judge, is Relator's argument is essentially that he need not
16 name Baylor Saint Luke's Medical Center as a defendant because
17 CHI Saint Luke's Health exercises a level of control over the
18 hospital and therefore is the correct defendant. But what
19 you're referring to, letterhead and the use of checks, courts
20 have looked at that issue all over the country. One in front
21 of me, I don't have it all in front of me, Judge, but in Wady
22 v. Provident Life, a Central District of California case, the
23 court held that the use of parent corporation's letterhead by
24 the subsidiary does not establish control or an alter ego
25 relationship.

1 THE COURT: Was that at a summary judgment or a
2 motion -- so that's where, again where I may not disagree with
3 you at summary judgment, but this is a motion to dismiss. Was
4 that decided at motion to dismiss? Because that's what I was
5 saying last week. I just don't know. Like to me, you would
6 take depositions and that would be figured out during
7 discovery. But if right now, the way I read her allegations is
8 that there's this scheme, and yes, he works for it ISD and he's
9 employed by Baylor Saint Luke's Medical Center, but the
10 employees from CHI Saint Luke's Health are in on this because
11 of these reasons. And one of the reasons is the checks and the
12 payment and the documents have their name on.

13 And so if I'm taking that as true, that's my angst.
14 How do I, how do I decide that at a motion to dismiss? I mean
15 I'll look at those cases, and I don't want, you know,
16 everything you tell me, Mr. Coffey, I'm not just going to willy
17 nilly. I'm going to go back and look at this again. But I
18 just don't know how I decide that at a motion to dismiss stage.

19 MR. COFFEY: Well, Judge, from our perspective too,
20 it goes back to the pleading requirements under Rule 9(b) and
21 to allege that sort of all alter ego relationship and that
22 level of control with specifics with a heightened level of
23 detail on particularity, that detail is not in the complaint.
24 And when CHI Saint Luke's and the hospital defendants came back
25 and argued that these are separate legal entities and that

1 there's no evidence that Baylor Saint Luke's Medical Center,
2 you know, or that the hospital defendants engaged in the fraud,
3 rather than simply adding Baylor Saint Luke's Medical Center in
4 when Relator had the opportunity, and faced with those
5 arguments and faced with an understanding, the Relator did not
6 add Baylor's Saint Luke's Medical Center.

7 THE COURT: Well, let me stop you there. That's a
8 different argument. Let's just say maybe I don't allow them to
9 add Baylor Saint Luke's Medical Center, but even if I don't,
10 how do I knock out CHI Saint Luke when you go through the
11 paragraphs that I mentioned, you know, the heart of their
12 complaints and then she's saying that we have these exhibits
13 with these documents that are in CHI Saint Luke's name, the
14 payments?

15 MR. COFFEY: So, first of all, we believe that the
16 arguments that are alleged in the complaint should be specific
17 to the defendants that have remained. Right? And so the
18 question being, well, how do I, how do I get rid of CHI Saint
19 Luke's Health for the reasons we stated in our papers, right?
20 If we are, if we have whittled down to an AKS-based theory of
21 liability, from our perspective, there is not sufficient
22 allegations in the complaint that show intend to induce
23 referrals on the part of CHI Saint Luke's Health.

24 THE COURT: Let me ask you a hypothetical, right.
25 Let's just say step outside of this case, that they have the

1 four buckets that they say are the kickback. The complimentary
2 international travel per the lucrative international patient
3 referral, the complimentary interpreters and the complementary
4 administrative assistant. If we had like a prototypical case
5 that, you know, day one -- so let me just start with one and
6 see if you disagree. On day one hospital provider gives any
7 one of -- sorry hospital system gives any one of those to a
8 provider. The provider accepts it. And then the next day
9 starts referring Medicare patients back to the hospital. I
10 mean if we had an easy case like that with those four -- do we
11 at least agree that that any of those four could potentially be
12 kickbacks if they induced a referral?

13 MR. COFFEY: Judge, you know, it's a pretty low bar
14 under the AKS what constitutes remuneration, right, anything of
15 value. It could be a Tic Tac or it could be --

16 THE COURT: Right.

17 MR. COFFEY: So we don't dispute that these things
18 have value and therefore technically there's remuneration under
19 the AKS. The problem is that is one element of the AKS.

20 THE COURT: Okay.

21 MR. COFFEY: From our perspective, more importantly,
22 you have to show that there was a knowing and willful violation
23 of the AKS. So that the defendants provided that remuneration
24 with the intent, the specific intent really to induce
25 referrals. And there are things that courts look at to

1 determine whether that intent was present.

2 THE COURT: Let me stop you there. And that's --
3 like I totally agree with what you're saying. But then, so if
4 I go to paragraphs in the complaint, 152, 154 to 157, then 160
5 and 163 and I read those paragraphs in conjunction with
6 documents they provided in the exhibit -- and now just looking
7 at this at a motion to dismiss, not to say at summary judgment
8 I wouldn't completely agree with you, I just don't know how I
9 say that with what they provided in those paragraphs and with
10 the exhibits attached, that they don't they haven't alleged
11 enough.

12 MR. COFFEY: So, Judge, our response to that is -- I
13 think using the Court's language from last week -- there was a
14 frequency of value and value of referrals, okay, and support
15 services that went along with that. Again, that's
16 remuneration, we understand that. And I think what the Court
17 is saying ---

18 THE COURT: So let me -- sorry to interrupt. So
19 that's why I knocked out the providers because you don't know
20 any of those answers and none of that was alleged. I mean,
21 none of that was alleged or provided. And there's no evidence
22 of any of that coming back from the provider. But on the
23 hospital side, I think that there's enough, based on these
24 paragraphs and based on the documents they provided, to keep, I
25 want, you know, to keep CHI Saint Luke's in at this point. And

1 ultimately, it's me, then at summary judgment if we don't get
2 to what you just said, then the case isn't going to survive
3 summary judgment. So sorry to interrupt.

4 MR. COFFEY: That's okay. So from our perspective,
5 you don't get to discovery, and therefore you don't get to
6 summary judgment without providing well-pled facts. And so I
7 think what they, what the hang up here, what the hang up that
8 we see here is that value, frequency of referrals, that's still
9 just referrals. Last week, Your Honor mentioned, well, if we
10 can look at the benefits that were provided to Dr. Hoffman, for
11 example, and then we can tie that to some temporal proximity to
12 the referrals that were made and that would be evidence.

13 The problem is, Relator never alleged anything about
14 any of that. There is no connection between this volume or
15 value and frequency of referrals, and anything that went back
16 to the hospital. In fact, there's not any allegation of any
17 referral from the remaining defendants, the provider
18 defendants, not one referral. So that would be sort of a leap
19 in logic.

20 The facts that are alleged in the complaint do not
21 provide enough facts from, okay, there was a value, there was a
22 frequency, there was certain volume of referrals to well, that
23 must have been intended to induce referrals back. There is no
24 connection. There's no allegation of the connection. There is
25 no allegation of intent. There's no allegation that there was

1 a referral tracking, for example. Without those pieces of
2 information that are required under Rule 9(b), with
3 specificity, the Court is not able, in our estimation, to make
4 that jump and argue that or state that there is sufficient
5 intent under the anti-kickback statute.

6 THE COURT: Yeah, I mean, so that's where I think
7 when, when he's talking about the referrals in those
8 paragraphs, 153, 154, 157, 160, 163, I mean so I totally agree.
9 I mean the complaint only has one example of an actual patient
10 referral. But then to me, the question is again the legal
11 question is there is sufficient details of the scheme to submit
12 false claims and is there sufficient reliable indicia to
13 support that? And that's where, like I said, just at the
14 motion to dismiss stage, I come down that in Paragraphs 152,
15 154, 157, 160, 163, and exhibits. But look I will -- you know
16 my two law clerks are on and we're all taking notes and we'll
17 look at what you said. But so you finish. I won't interrupt
18 you again at all, Mr. Coffey. Tell me anything else you want
19 to add.

20 MR. COFFEY: Sure. And it's just something to go
21 back to adding Baylor Saint Luke's Medical Center. From our
22 perspective, you know, there is a futility here. The Relator
23 has already had three opportunities to state a claim under Rule
24 12(b)(6). They do not include Baylor Saint Luke's Medical
25 Center and it would be futile to do it at this point. The same

1 is true with respect to 9(b). There's no details that can be
2 added at this point that haven't been included already.

3 We believe there is undue delay for the same reasons
4 we've already discussed and don't need to repeat those.
5 There's been a repeated failure to cure deficiencies and that,
6 I believe, is pretty self-explanatory as well.

7 And Relator's counsel asked if there was prejudice.
8 Certainly, the Baylor Saint Luke's Medical Center, which would
9 need to potentially seek representation and get up to speed.
10 Certainly it's the remaining parties who would have to have
11 this hanging over their heads for however long it may take.

12 I also believe that adding Baylor Saint Luke's
13 Medical Center at this place stage would really change the
14 complexion of this case entirely because now, you know, whereas
15 the two hospital defendants at issue now are not DHS entities,
16 which is required, for example, under the Stark Law, allowing
17 Relator to name a DHS entity would greatly prejudice the
18 remaining parties. It would change the entire, as I said,
19 complexion of the case.

20 You know for those reasons and then those mentioned
21 in our briefing, we don't believe it's proper under Rule 9(b)
22 because that requires you to have the details of the outset,
23 not after discovery. And it wouldn't be proper under Rule 15.

24 THE COURT: Before I get to Mr. Robinson, Mr.
25 Houston, Ms. Brown, I'll let you speak uninterrupted.

1 MR. HOUSTON: So we're going --

2 MR. COFFEY: Thank you, Your Honor.

3 MR. HOUSTON: Oh, you said you said Ms. Brown. I'm
4 sorry.

5 THE COURT: Yeah, sorry.

6 MS. BROWN: Well, I want to turn back to the issue
7 of amending to add Baylor Saint Luke's. And you know, Relator
8 proactively sought leave to amend prior to any ruling by the
9 Court. And during the last round of briefing, of course, we
10 agreed not to submit an amended complaint until there was
11 guidance from the Court.

12 And so I just want to note that the Relator should
13 not be punished for submitting proactive amended complaint.
14 He, you know, has not had guidance from the Court until right
15 now. And, you know, that would encourage Relator to do the
16 opposite, which is to get, you know, get a court ruling
17 initially and only then seek leave to amend. And this is a
18 complex case in terms of the substantive law and the pleading
19 requirements and the defendants' documents themselves are, you
20 know, show overlapping corporate responsibility for the same
21 actors and the same acts.

22 And so we would disagree there's been any bad faith
23 conduct or undue delay. This would be the first request for
24 leave to amend after getting any guidance from the Court. And,
25 you know, of course, the Plaintiff doesn't have access to

1 discovery. And we are -- the prejudice that was identified by
2 Mr. Coffey is not really prejudice under the law. Having to
3 hire counsel is not, you know, and be a defendant in that case
4 is not prejudice. You know discovery can proceed while these
5 issues are aired out. So there's no reason why it would have
6 to be, you know, it should delay the case in any way. And so
7 this is, this is a technical issue that can be easily cured for
8 a lawsuit that, you know, is going to continue.

9 THE COURT: Ms. Brown, do you know why they didn't
10 name Baylor Saint Luke's after the first, after the first
11 amended complaint?

12 MS. BROWN: After the first amended complaint, it
13 was, you know, it was -- it's been an evolving understanding of
14 the corporate structure and we thought that we had just, you
15 know, to defined Baylor Saint Luke's as a component of CHI
16 Saint Luke's Health. That was our understanding. And, you
17 know, now defendants are saying that we need to add Baylor and
18 we're happy to do so.

19 THE COURT: They're not saying you have to -- right,
20 go ahead.

21 MS. BROWN: But this is, we are not seeking to change
22 the allegations in any way. We're just seeking to add, you
23 know, seeking to add this entity that's all over the documents.
24 That's, you know, it's alleged in the complaint and it's an
25 issue of corporate structure. It's not, it's not changing the

1 allegations in in any way.

2 So for those reasons and because this is our first
3 opportunity for leave to amend after guidance from the Court
4 and discovery has not commenced, there's no, there's been no
5 deadlines set to amend parties, we think it's appropriate at
6 this time.

7 THE COURT: I mean --

8 MR. COFFEY: Your Honor, may I have an opportunity to
9 respond.

10 THE COURT: Yeah, let me. So I know that we can all
11 infer Judge Eskridge meant, but it does -- my angst, Miss
12 Brown, is that someone made a strategic decision on your part
13 not to name Baylor Saint Luke's and now they're changing,
14 they're changing course when clearly this was an issue that was
15 raised. So there was a round a briefing on the motion to
16 dismiss and the hope is that you get an opportunity to see what
17 they raise, and then you cure those things in the second
18 amended complaint. But -- and I still feel like there may be
19 an issue of immunity. I mean some of it, it just doesn't seem,
20 I don't know, logical why unless there was an immunity issue or
21 some concern like someone -- and I get you didn't draft the
22 complaint originally -- why someone wouldn't name Baylor Saint
23 Luke's without like a strategic decision because you're naming
24 CHI and CHI Saint Luke's. It's just -- so that's where my hang
25 up is, the fairness to allow you to name them if someone has

1 already made a strategic decision. We've gone through all this
2 briefing you take that risk and then you've got to live with
3 that risk. But again, it doesn't, as I said before, it doesn't
4 change my opinion right now of leaving in CHI Saint Luke's, but
5 I am really on the fence about allowing you leave to amend for
6 that. Is there anything else you want to add to what I just
7 said.

8 MS. BROWN: You know, I don't want to repeat myself.

9 THE COURT: Okay.

10 MS. BROWN: Just that there's no strategic decision.
11 This is, you know, an evolving understanding of a complex
12 corporate structure and, you know, unclear documents as to the
13 structure and, you know, a lack of prejudice, a lack of bad
14 faith --

15 THE COURT: I'm not saying any of that. I'm saying -
16 - just because you make a strategic -- I mean if someone made a
17 strategic decision to have CHI and CHI Saint Luke's and it's
18 clear the Relator worked for Baylor Saint Luke's, and I mean
19 you're all good lawyers, like why -- that's where I guess my
20 confusion is. Why, if you're going to name the other two, why
21 wouldn't you name the most likely party, which is the one that
22 he worked for versus like the most remote party which is CHI.
23 And so that's -- without saying there's bad faith, I mean I
24 understand Mr. Coffey's position that there's been multiple
25 rounds of briefing. This issue was raised and it's just a

1 matter of -- and I get it. I wish it was as simple as just
2 putting it in, but it's not because then I have to allow them
3 the opportunity to file a motion to dismiss.

4 And as he said, I do agree with their legal argument,
5 that, you know, CHI and CHI Saint Luke's from a legal
6 perspective, you couldn't have a Stark claim, but you could
7 against -- from a legal, not whether it's true or not -- you
8 could against Baylor. And so that my hesitation of allowing it
9 at this point. Mr. Coffey, you wanted to respond. So let me
10 let you respond.

11 MR. COFFEY: Thank you, Judge, and I'll keep this
12 brief. All indications here point or suggest at least that
13 keeping Baylor Saint Luke's Medical Center in was an
14 intentional strategic decision, as you referenced. I think
15 counsel is attempting to minimize the importance of including
16 Baylor Saint Luke's Medical Center into this complaint at this
17 point. It's not quite as complex as counsel is letting on.

18 Baylor Saint Luke's Medical Center is the only
19 hospital that we're talking about here today. It's the only
20 entity that submits claims. It's the only DHS entity. So not
21 including it had to have been some intentional decision. This
22 idea that Saint Luke's Medical Center is somehow subsumed into
23 CHI Saint Luke's Health, it's not. We made that clear from the
24 get-go. They're separate legal entities. But by that same
25 logic, there would have been no reason for Relator to add CHI

1 Saint Luke's Health because they also manage CHI, which is the
2 ultimate corporate parent.

3 So what we're talking about here is every -- I think
4 there's something like 20 entities under the CHI Saint Luke's
5 Health umbrella is now, by Relator's logic, is every one of
6 those entities also a defendant that can be added in this
7 complaint? Without proper allegations that satisfy Rule
8 12(b)(6) and Rule 9(b), it would not be proper to pick and
9 choose which defendants are added after three iterations of the
10 complaint, after a couple of rounds of amendments, and after a
11 substantial amount of briefing and arguments in front of the
12 Court, especially arguments that specifically noted that CHI
13 and CHI Saint Luke's Health were not the proper defendants and
14 the reasons that we provided in support of that assertion.

15 THE COURT: Ms. Brown, I don't want to beat up on
16 you. I like to make things as simple as I can. See CHI and
17 CHI Saint Luke's don't actually submit anything to Medicare.
18 It's Baylor Saint Luke's that actually -- so when we're talking
19 about like a false claim, it's someone, you know, someone gives
20 the kickback to the provider, the provider provides the
21 unlawful referral. The referral is going to Baylor Saint
22 Luke's. They're the one that's providing the medical services
23 and they're the ones that's submitting to Medicare. Now I get
24 if CHI or CHI Saint Luke's had something to do with that and
25 were part of the scheme, they could also be liable. But the

1 central figure is the one that's actually getting the referral
2 and doing the billing and that's, you know, I'm resaying what
3 he's saying, that you would think that that's the central
4 player that you want in your complaint because they're the ones
5 that actually submitting to Medicare, performing service, and
6 getting the payments from Medicare.

7 And so what's I'm trying -and I've been on both sides
8 of this -- but if you're sitting in a conference room and
9 you're deciding like, okay, who are we going to name in this?
10 Like how do you not name, how do you not name them without,
11 like, a lot of thought? Because you have to know, right, like
12 if you don't know that, then the complaint on its face would
13 fall apart. And it would seem like that would be the -- when
14 you're trying to figure out what's the, you know, the unlawful
15 scheme here and identifying the players, you would want to know
16 who's the one that's actually submitting the claims to Medicare
17 and getting the reimbursement.

18 And so it doesn't take away from my argument, CHI
19 Saint Luke's at this early stage could be a part of it, but I
20 think there's enough of the record that CHI Saint Luke's wasn't
21 the one performing the service. They weren't the one billing
22 Medicare and they weren't, they weren't the ones billing
23 Medicare or performing the medical service. Did you follow
24 what I'm saying? But I mean, Mr. Coffee is saying it's pretty
25 obvious that Baylor Saint Luke's is the actual, you know,

1 hospital that's providing a medical service.

2 MS. BROWN: Yes, I understand that what you're
3 saying. All I can say is that, you know, as I said before,
4 that the corporate structure of these entities wasn't entirely
5 clear for us. If we could do it over again, I think we would
6 have named them from the beginning. We can't go back and do
7 that. This is the first opportunity that we have had with the
8 Court's guidance to, to leave to amend. We're still within the
9 statute of limitations for bringing claims against this entity.
10 There are no, there's no prejudice to this. You know it's an
11 issue of technical and corporate structure.

12 They'll have an opportunity to file a motion to
13 dismiss if there are any immunity issues. You know, I guess we
14 just, you know, there was no bad faith on our part. No
15 strategic decision other than, as I'm telling you, that we
16 were, we had confusion about the corporate structure and, you
17 know, I think part of that confusion was because it's not clear
18 the way these entities operate, you know, who's running the
19 International Services Department based on who's paying the
20 checks, who's, you know, who's letterhead it's on, you know,
21 whose employees are at issue. You know it's the confusion
22 caused by the way that the businesses operated that I think,
23 was, you know, lead to our confusion. So we would ask again
24 for the Court to allow us to leave to amend Baylor.

25 And independently of that, we think, you know, as

1 you've addressed, CHI Saint Luke's is liable because, you know,
2 our understanding and our allegations are that their employees
3 were orchestrating the scheme.

4 THE COURT: Mr. Robinson.

5 MR. ROBINSON: Thank you, Your Honor. Let's talk,
6 let's shift gears now then and talk about the provider, the
7 other provider defendants other than Dr. Hoffman, who Mr.
8 Houston will address.

9 We agree that they should all be dismissed, but we
10 think they need to be dismissed with prejudice. We think the
11 case law, whether you look at the Fifth Circuit's decision in
12 Webb, the decision in Grubs, or any of the other cases that we
13 cited in our brief, the purpose of Rule 9(b) is to force the
14 Relator to put what they know on the record when they plead and
15 it is not. It's a gate to discovery. And to say, well, you
16 know, maybe sometime down the road you can come back and you
17 know, after you've had discovery, then you can come back and
18 try to add some of these provider defendants back in, that's
19 completely antithetical to the purposes of Rule 9(b). In fact,
20 that's the argument that Fifth Circuit specifically rejected in
21 the Webb case when the Relator was saying, please let me come
22 back. I can amend after discovery. The Fifth Circuit said no.

23 So this really needs, this was put up or shut up time
24 when they filed the second amended complaint and they didn't
25 put up. And so at this point, the fact that they have

1 inadequately pled their claims means they don't get discovery
2 and a chance to come back.

3 So in addition, we think that further amendment would
4 be futile. It had three chances to get it right, very clear
5 that the Relator doesn't know anything about the provider
6 defendants and what they did or even about any communications
7 between the CHI defendants and any of the provider defendants.
8 I mean there are a few information and belief allegations in
9 the complaint, but none of that is enough to satisfy the Rule
10 9(b) requirements.

11 We can't have some sort of hybrid situation here
12 where they're not given leave to amend now, but they're given
13 leave to amend a year from now or something like that. The
14 rules on dismissals don't allow that kind of a hybrid approach.
15 They shouldn't be given leave to amend. It means that should
16 be it for the provider defendants.

17 And then lastly, I would just point it out. You've
18 seen our arguments about the immunity defense that Baylor
19 College of Medicine has. So we also think that further
20 amendment as to Baylor College of Medicine would be futile as
21 well.

22 THE COURT: Mr. Houston.

23 MR. HOUSTON: I would echo. I represent other
24 provider defendants, Your Honor, and I would echo on behalf of
25 the other provider defendants that we believe that the

1 dismissal should be with prejudice for the reasons stated. I
2 believe he stated it sufficiently enough that I do not wish to
3 state it over again.

4 I'd also point out for the record that again, I
5 understand this, that you are contemplating the memorandum of
6 recommendations to the Court. And, of course, these are just
7 preliminary --

8 THE COURT: Let me interrupt. Let me say I'll
9 research again. I didn't ask Mr. Robinson. I'll research
10 again the with or without prejudice. My concern was the
11 Relator is throwing this up. It would have been discovery.
12 They find -- they've alleged this, and I think sufficiently,
13 against the provider -- against the, I'm sorry, the hospital
14 defendants but not the provider defendants. But I don't think
15 for, you know, as we've discussed last week and this week, that
16 there's enough to survive a motion to dismiss the complaint.
17 But what about during discovery if they find a treasure trove?
18 And that that's where I have to go back on the law and see what
19 Mr. Robinson was saying. But I will, I promise you I will
20 research that. But go on.

21 MR. HOUSTON: So, okay, so that would be the first
22 point as to the other provider defendants.

23 Now with regard to Dr. Hoffman, for the reasons
24 stated by both Mr. Coffey, I believe, I think that you could
25 make the exact same arguments as to Dr. Hoffman. If you look

1 through the pleadings carefully, all that really differentiates
2 Dr. Hoffman from the other providers, which I believe you've
3 already said there isn't sufficient allegations, particularly
4 as to any benefit they expected, that they were the signatory,
5 did they have the expectation? And there simply wasn't enough
6 there. The only difference with Dr. Hoffman is there is a
7 larger volume of international patients, but there's exactly
8 the same as the rest. There's no allegations -- and I'm not
9 going to talk about evidence here, but I will talk about the
10 one bit of evidence they did attach. But there's no sufficient
11 allegations under Rule 9(b) with the specificity to show that
12 either Dr. Hoffman expected and thought that he was expected to
13 refer Medicare/Medicaid patients back to Saint Luke's. I'll
14 use it -- I'll lump it together. We talked a lot about
15 entities. I'll lump it together, to Saint Luke's in return for
16 these international patients. There's no allegations relating
17 to what Medicare/Medicaid patients he did refer back or if
18 there was any email saying your volume of -- or an allegation
19 that his volume, they ever questioned your volume of Medicare
20 Medicaid patients. Under I think as the Court noted, Exhibit
21 9, there was a large number of international patients that went
22 through Dr. Hoffman's office. There's no question about that.
23 But I mean, that doesn't make the case against Dr. Hoffman any
24 more than the rest of them. There were allegations that other
25 doctors had international patient referrals. But I think, and

1 believe me, I believe I think it should be pointed out and one
2 of the objections we'll raise, which, of course, I'll need to
3 see your final memorandum if I don't persuade you today, that
4 Dr. Hoffman is any different is, I think -- and they did attach
5 one exhibit. And that was Exhibit 3, which we spoke about
6 earlier with reference to Paragraph 25 of the complaint, which
7 is all the totality of the allegations against Dr. Hoffman.
8 And Exhibit 3 I think can be used, but since it was attached to
9 their motion, I mean their pleadings, for and against them, but
10 it's pointed out in Exhibit 3 that Dr. Hoffman provided
11 excellent service to the international patients. So certainly
12 that would be an explanation and perhaps it's the only
13 explanation in the pleadings as to why he received these large,
14 these volumes of international patients, but certainly nothing,
15 no allegation, no specific allegations that would be required
16 by Rule 9(b) as to Dr. Hoffman that a) he was referred all of
17 these international patients because he was sending back
18 Medicare patients, and b) that he expected and was expected or
19 knew that he was receiving any international patients because
20 of his referral back or anything of that nature.

21 What is showed, which is probably the case, is Dr.
22 Hoffman took care and took good care of international patients
23 and there is certainly nothing wrong with that. It's lucrative
24 for the hospital. It's lucrative for all, but it's not a
25 violation of any the Stark rules or any of the rules alleged.

1 So we would incorporate the arguments that I think
2 have been raised in writing and our moving papers in the
3 providers motion to dismiss the second amended complaint, which
4 was filed on November 16. We would incorporate the arguments
5 raised by Mr. Coffey, who enunciated it much better than I can,
6 I believe, on the specifics of what is required in these
7 particular cases. I would incorporate a little bit of what Mr.
8 Robinson said and what the Court has said about all the other
9 providers and would just urge you to look at it again and see
10 that Dr. Hoffman is no different other than he has a larger
11 volume, but that doesn't mean that he should be the one left.
12 And I'm not sure he's even necessary for this particular matter
13 but I do believe that there's not enough pleadings at this
14 stage and that he should be dismissed pursuant to 12(b)(6) and
15 12(b) and 9(b) and it should be with prejudice.

16 And those would be the exact probably the same
17 allegations or objections I would raise if you do issue a
18 memorandum, Your Honor, but I wanted to give you a heads up on
19 it.

20 THE COURT: Sure. So, Mr. Houston, so again, we
21 don't know because we don't have, you know, there's just one
22 example of a supposed false claim in the complaint. Right. So
23 in that situation, you know, my view of the law is did the
24 Relator overcome 9(b) when they're not providing more than one
25 example of a false claim, or providing actual false claims data

1 in the complaint? Is there sufficient details of the scheme to
2 submit false claims and is there sufficient reliable indicia.
3 So why I thought, why I thought Dr. Hoffman was different was I
4 didn't believe as to all the other providers that there was
5 sufficient reliable indicia because I thought the other
6 exhibits were sporadic as far as times. Right?

7 I mean I think we can assume, and for legitimate
8 reasons, that all of the providers that named at some point
9 have referred back Medicare patients back to the hospital. But
10 the question is, is that, you know, were they induced? And was
11 that a kickback? Well, we don't know. And there could be
12 legitimate reasons even if there was a lot of volume.

13 But all we know from the complaint is sporadic
14 allegations and documents as to every provider except your
15 client. And I thought two things. So Exhibit, Exhibit 9, they
16 show activity to him going every year from 2007 to 2017 that
17 they're doing things for him out of one of those four buckets.
18 And that's what I thought differentiated. They're showing a
19 relationship with him as the four things that they're alleging
20 are kickbacks every year from those dates.

21 And then we can turn to that one email and I don't
22 necessarily say that it's, there's something nefarious, but the
23 email that they have that we've debated about shows at least
24 somebody on the hospital side was saying, hey, we would like --
25 and there may be perfectly lawful reasons -- but we would like

1 international patients to be referred to Dr. Hoffman.

2 And so to me at the pleading stage, again, this could
3 all be different at summary judgment, I think he's different
4 because of the -- I do believe the volume, as you said, doesn't
5 show anything. I think the volume, for me, is enough
6 sufficient reliable indicia just to keep him in. And that's
7 why I thought he was different than everybody else.

8 MR. HOUSTON: And I get that. And I guess what we're
9 -- and I'm sorry I didn't mean to --

10 THE COURT: No. I'm done. Go ahead.

11 MR. HOUSTON: And I guess my argument today is -- and
12 I understand when you say is there a bigger part? He's listed,
13 I mean he's talked about more. But I believe that under the
14 rules and the cases that I've seen, particularly under Rule
15 9(b), when you make these allegations of fraud, it requires
16 more than just the quid, which is what they've shown. But
17 there's nothing about a pro quo. There's a larger quid with
18 him, but no specific allegations as to this large volume. What
19 was the expected?

20 And, in fact, again, I guess Exhibit 3, which again,
21 they seem to say indicates that the hospital preferred him for
22 international patients. Well, it says in that exhibit, which
23 we take is true, I guess that they referred him international
24 patients because he does a good job on them. And I think you
25 have to reach great links that aren't either pleaded, supported

1 by the evidence or anything, but just requires supposition
2 well, he got a large volume of international business. They
3 seem to like him. Therefore, there's a scheme. And I guess
4 its value is what I'm hearing you say, but --

5 THE COURT: Not just in value, that's where I'm
6 looking at specifically Paragraphs 152, 154, 156, 157, 160 and
7 163. I've got to take those statements that Relator is saying
8 is (indiscernible). Where it's, it's saying in those that who
9 the preferred providers are. I'm summarizing this, but
10 basically they're giving those four buckets of things of value
11 to these providers in return for Medicare referrals and that
12 they could be on a preferred list the more that they refer.

13 Now, ultimately, again, that may not be true or there
14 may be other reasons, but at this stage, I don't know how I
15 can't take that is true. Even if, I mean, that's the
16 allegation, there's -- that's what I'm saying is they're
17 reliable indicia to back up those allegations? And that's
18 where I go back to Exhibit 9 and say, okay, every year from
19 2006 to 2017, he's getting one of those four buckets or
20 something of value.

21 MR. HOUSTON: But I guess my final -- and I'm looking
22 at 152. And I mean those paragraphs relate to knowledge or
23 what was alleged against Saint Luke's but there's no
24 allegations as to Dr. Hoffman that even if he knew about it,
25 felt like he had to prefer more Medicare. I mean there's not,

1 that is not specific as to him. Maybe and again, I'm not going
2 to get it into it. Maybe, that may or may not survive a claim
3 against the entity, in particular the biller, but as far as the
4 doctor and making that particular specific allegation or, you
5 know, and again, I'm not going to say evidence, but that
6 allegation, that's just not (indiscernible) to him, to me
7 anymore than some of my other clients. And I believe, I agree
8 with you as to all the providers. I just don't think he's
9 different and that would be our objection as to Dr. Hoffman,
10 the objection we raised that he's really no different even
11 though there's a larger volume. The allegations do not meet
12 the standards required by 9(b), which were really high in these
13 cases when you're alleging these types of cases against these
14 physicians. So he should be dismissed with prejudice as well.

15 THE COURT: Thank you. Anybody else, anybody else
16 want to be heard? Any final statements?

17 MS. BROWN: Yes. Your honor. I just want to be done
18 a few points. First of all with regard, I guess I'll go in
19 backwards order, starting with Dr. Hoffman's arguments. You
20 know on the emails, I think Your Honor has already discussed
21 them. And I would just say again I think that the defendant's
22 argument here where they're picking an interpretation of those
23 emails is directly contrary to the analysis of the
24 (indiscernible) case. So I just point the Court to our brief
25 on that, and that case in particular.

1 With regard to the defendants, the doctor, the
2 physician and physician group defendants that the Court is
3 inclined to dismiss without prejudice, we wanted to stress that
4 you know, from the Relator's perspective, they should be, they
5 should be dismissed without prejudice. And, you know, the, you
6 know, I understand what the Court is saying about reliable
7 indicia against Dr. Hoffman based on the specific exhibits that
8 were provided with respect to him. But from the Relator's
9 perspective at the pleading stage, those were, those facts were
10 not required to state a claim because the Relator is allowed to
11 allege extensive volume, high frequency, significant value,
12 using factual allegations. And he doesn't need to provide, you
13 know, he provided so many examples of remuneration to these
14 physician defendants. You know many examples of kickbacks for
15 each physician.

16 And so, you know, our reading of the of the case law
17 is that he did enough at the pleading stage to survive against
18 them. So, you know, we understand that the Court is inclined
19 to dismiss them without prejudice, and we contend "the without
20 prejudice" is important there because, you know, our
21 understanding of the law is that the allegations are sufficient
22 as to all of the providers because of the extensive allegations
23 as a whole that showed that there was such an extensive volume
24 and frequency and flow to this set of preferred providers.

25 So I just wanted to put that on the record and then,

1 you know, that the counsel for the other providers mentioned,
2 you know, that they would be prejudiced if they're, you know,
3 if they're not dismissed without prejudice. And I just wanted
4 to remind the court that, of course, at any point, you know, if
5 we wanted to add one of them back in, we would have to file a
6 motion to amend and they could raise at that time any
7 objections that they had about, you know, and they wouldn't be
8 abstract about, you know, the course of discovery or the
9 progress of the case. So, I just wanted to urge the Court to
10 dismiss without prejudice any providers that it is inclined to
11 do so.

12 MR. ROBINSON: Your Honor, can I make one point?

13 THE COURT: Sure.

14 MR. ROBINSON: I want to just comment briefly,
15 because you've referenced this issue about the reliable indicia
16 standard. I just want to make it clear it's not -- the cases
17 we're talking about are not reliable indicia of the kickback.
18 It's actually -- that actually needs to be reliable indicia
19 that false claims were filed and here, so it's not the fact
20 that there might be more detail about what was given to Dr.
21 Hoffman, does not create any reliable indicia that, as a result
22 of that, false claims were filed with Medicare and Medicaid.
23 That's what the reliable indicia as to relate to. And if you
24 look at the Fifth Circuit and the Western District decision in
25 the integra Med, right, it's got to be reliable indicia that

1 there was a scheme to submit false claims to Medicare and that
2 some false claims are actually submitted.

3 And here, there's nothing other than just rank
4 speculation except with respect to this one Dr. Waters, who
5 wasn't even a defendant, that any of these doctors made a
6 referral to the hospital because of these alleged kickback.

7 THE COURT: Let me ask you that. In the complaint,
8 and you may dispute it, they're saying that 42 percent of the
9 revenue or 42 percent of their billings come from Medicare.
10 And so that they be disputed going forward, but that's, that's
11 a significant amount of revenue that they derived from
12 Medicare. And there's no, nobody's, nobody's refuting that
13 they made Medicare referrals to the hospital providers. The
14 question is: Were those referrals induced by kickbacks?

15 And so when I'm looking at the reliable indicia, if
16 these, if these four, these four buckets are clearly
17 remuneration and this one doctor for 11 years is getting a lot
18 of those four buckets, to me at a pleading stage that's
19 reliable enough. It may not be at summary judgment because we
20 don't, we don't, you know, we'll see more. But I don't know
21 how I can't say that motion to dismiss stage, if you have a
22 doctor that's receiving this and 42 percent of the hospital's
23 revenue is coming from Medicare?

24 MR. ROBINSON: Well the 42 percent from the hospital
25 is really not the right fact. Do you really have to look at if

1 you had information about the doctors' patients. For example
2 if you knew -- there was a case and I can't remember the name
3 of the case, but there's a case in the medical device field
4 where there was an alleged kickback and because 80 percent --
5 there was data that showed that 80 percent of the devices were
6 used in the Medicare population because it was for people over
7 65, all right, that the court said was reliable indicia because
8 it related to what the physicians were doing, not and whether
9 it was likely that there were false claims referred by these
10 doctors that hit the Medicare books.

11 THE COURT: I'm going to interrupt. Again, to go
12 back to what whether it's true or not. You know I don't know.
13 But go back to what they're specifically alleging in 152, 154,
14 and 155. In those paragraphs, they're talking about like
15 Paragraph 160, Dr. Hoffman was preferred for ISD referrals
16 because he was a consistent source of referrals of Medicare and
17 Medicaid patients back to CHI Saint Luke's. The Relator has
18 attended dozens of ISD staff meetings where VP Matar and
19 Associate Director Sanchez instructed ISD to refer as many
20 patients as possible to Dr. Hoffman. So I mean that's, that's
21 a statement and then what do I have that's reliable?

22 So they're saying here, the Relator is saying that
23 he's providing all of these Medicare referrals. And what I'm
24 saying is for this 11-year period, there's evidence that he was
25 receiving a lot of these four buckets of improper remuneration.

1 MR. ROBINSON: So again, you need the beef, you need
2 the beef on the other side of the transaction too. They're
3 just, they're just saying and he referred a lot of Medicare
4 patients. That's not enough. Unless you have a choice, if
5 you're a Relator, you have a choice. You need to give the
6 specifics or, you know, you set out enough facts that gives
7 reliable indices that there were, in fact, that there must have
8 been Medicare referrals.

9 So in the case of the devices that are only used in
10 the Medicare population, that the courts have said are reliable
11 indicators. But here they've got nothing. They didn't give
12 the specifics and they didn't give any reason for you to
13 believe that the statement about referrals by Dr. Hoffman or
14 anybody else is true. And they had to do one or the other.
15 And this is a pleading standard. So, you know, this whole
16 reliable indicia test is a pleading standard under 9(b). So
17 you can't say that they can provide the reliable indicia later
18 on after discovery. Now is the time that they have to do it.

19 THE COURT: But the documents disagree because they
20 are saying -- the complaint is saying that you can't become a
21 preferred practitioner unless you refer back a lot of Medicare.
22 And so that's a conclusory allegation. Right?

23 MR. ROBINSON: Right.

24 THE COURT: So what did they do to back that up?
25 They provide an 11-year history of giving him things, four

1 different things that they allege during those eleven years,
2 every year, of what they classify as improper remuneration. So
3 I don't know how at the pleading stage if they're making that
4 assertion and they're showing the potential of giving him
5 kickbacks, how that's not -- again, it could be different at
6 summary judgment, but I have to take what they're alleging as
7 true if there's, if there's sufficient details and their
8 sufficient reliable indicia.

9 I mean so I know we disagree but -- and, you know,
10 maybe we'll agree at summary judgment, but for right now that
11 was how I differentiated him from the other doctors. That it
12 was sporadic against the other doctors. And I didn't find that
13 reliable.

14 MR. ROBINSON: My only point is that the reliable
15 indicia have to not be about the quid. It has to be about the
16 quo. And they either needed to say here is a list of all these
17 referrals from Dr. Hoffman or --

18 THE COURT: If he doesn't work in the Billing
19 Department, how is he going to get that? At the pleading
20 stage? He's in the ISD Department and he doesn't have access
21 to that. How is, how is he going to get access to that?

22 To my understanding, the Fifth Circuit is if you
23 don't have access to that, you have to allege enough to show
24 that it's reliable. And so he doesn't -- he can't provide
25 examples. And so what does he -- you know, I'm just looking on

1 balance. What does he provide?

2 MR. ROBINSON: Well he would have to create, maybe he
3 would have information about a pattern where Dr. Hoffman's
4 referrals went up every time he got a patient from the
5 hospital. I mean there has to be something other than they're
6 saying he, or any of the other doctors, send people over
7 because we don't know. And what if all he sent over were
8 private commercial insurance patients?

9 THE COURT: I mean then he's going to be out on the
10 summary judgment.

11 MR. ROBINSON: Right.

12 THE COURT: He'll be out on summary judgment even if
13 he sent Medicare, but there's no correlation between what he
14 referred and remuneration that he was receiving. That where
15 I'm saying we go back to what I said last week that there could
16 all be a legitimate reason for everything the defendants were
17 doing. But I just don't know as to him how I can make that
18 determination right now.

19 MR. ROBINSON: Well that's why I think I would urge
20 you to look at the integra Med case again.

21 THE COURT: Okay.

22 MR. ROBINSON: Because there, the court said there
23 was a perfectly -- if there was a perfectly benign explanation
24 at the pleading stage, the case is gone.

25 THE COURT: But I think that -- if my memory goes,

1 was that a District Court case and not a Circuit case? Most of
2 the cases that you all cited were summary judgment cases. But
3 where was that, where was that case decided?

4 MR. ROBINSON: It was a District Court case that was
5 later affirmed by the Fifth Circuit.

6 THE COURT: Okay.

7 MR. ROBINSON: Okay. So we have -- we've provided
8 the cites but it was affirmed.

9 THE COURT: Okay. I'll read that case.

10 MR. COFFEY: Judge, if I may?

11 THE COURT: Sure.

12 MR. COFFEY: Just a couple more points here. Your
13 Honor, you raised a very good point about Relator not having
14 access to the billing information or data about Medicare
15 referrals and they've gone back to Baylor Saint Luke's Medical
16 Center, that's true and that's because nobody at ISD had access
17 to that information because what they were interested in was
18 providing services to international patients. And so that sort
19 of expresses that this whole claim lacks responsibility, right?

20 You've got people who work at ISD who have absolutely
21 zero insight into the Medicare/Medicaid referrals that are
22 coming from the community positions, if at all, to the
23 hospital. And there's nothing in the complaint that allows us
24 to peek under the hood and take a look at that. There's not
25 one detail about those referrals. So Tania Matar and Angie

1 Sanchez, they don't have access to that information. They're
2 not alleged to have access to that information. There's not
3 well put allegations about tracking referrals of Medicare
4 Medicaid patients.

5 So when you talk about the wealth of information in
6 the exhibits and how that shows remuneration, that may be true
7 that it shows remuneration. But again, that's the first
8 element of an AKS violation. You have to plead with
9 particularity under Rule 9(b) that there's also this intent and
10 that's how you have the indicia of reliability, right? There's
11 a, there's a scheme with an intent to induce.

12 What's pled in the complaint does not meet that
13 pleading burden for the reasons we've stated. There's no way
14 to say that the remuneration on the one hand was actually
15 provided with the intent on the other hand to induce referrals.

16 Well, the last, the last point I wanted to make to
17 you, Judge, is that we agree that the sporadic nature of the
18 referral and the interpreters and the support services that
19 went to the dismissed provider defendants, that was in fact
20 sporadic, we just want to clarify too that would speak to a
21 lack of intent on the hospital defendants' part as well.

22 THE COURT: Go ahead, Ms. Brown.

23 MS. BROWN: Your honor, just in response to those
24 points that Mr. Coffey made. There are direct allegations in
25 the complaint of tracking and the knowledge that the idea of

1 the ISD staff had of the number of referrals that were provided
2 by these preferred physicians, such as Paragraph 153, the
3 Integra Med case is a factually different case where the
4 defendants were acting in a way that was consistent with legal
5 requirements. So it was a case, it was one of those cases that
6 doesn't implicate the one purpose rule where even if you have a
7 lawful purpose but you also have an unlawful purpose, that's a
8 violation. So I think that's the issue with that, with that
9 citation.

10 And then, you know, on the issue of reliable indicia
11 of false claims submissions, we would just point you to our
12 briefing on that issue. That's all.

13 THE COURT: Anything else?

14 MR. COFFEY: And, Judge, I promise this is it with
15 respect to Paragraph 153. In our first motion to dismiss the
16 first amended complaint, we stated that there was no, for
17 example, allegations about referral tracking. Before Relator
18 responded to our motion to dismiss, they submitted the proposed
19 second amended complaint which then had allegations about
20 referral tracking. Our point is that those allegations are
21 threadbare. They're not pled with particularity and pointing
22 to Ms. Brown's example of Paragraph 153, it says, in very
23 conclusory fashion, also put on information of belief, which
24 was not proper, that the senior ISD staff tracks the number of
25 Medicare referrals. And how do they know that? They had

1 meetings. But there's no 9(b) particularity around this
2 allegation. When were the meetings held? Was Mr. Chihi
3 present? Who was present? What did they discuss? This is the
4 who, what, where, when that you need to satisfy Rule 9(b). And
5 this example perfectly shows that it's not present in the
6 complaint.

7 THE COURT: So when I was fighting the paragraphs I
8 found most persuasive, I didn't include 153. I said 152, 154
9 to 157, 160 and 163.

10 So okay, so this is what we'll do. I'm hoping this
11 is going to be our priority that we get this. This will be our
12 number one priority to get this done so you can get your
13 objections on record. But I appreciate it. This was really
14 the longest hearing I've ever held, so this was really helpful.
15 Okay. Thank you, all.

16

17 (Hearing adjourned at 1:24 p.m.)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

A handwritten signature in cursive script that reads "Sonya M. Ledanski Hyde".

Sonya Ledanski Hyde

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Date: April 15, 2022